PD-0645-19
COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS
Austin Texas

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COURT OF CRIMINAL APPEALS
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MANYIEL PHILMON,	§	
PETITIONER	§	
	§	
V.	§	**NO. PD-0645-19**
	§	
THE STATE OF TEXAS,	§	
RESPONDENT	§	

ON DISCRETIONARY REVIEW OF CAUSE NO. 01-18-00279-CR IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS.

§ §§
STATE'S BRIEF ON THE MERITS
§ §§

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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES.....3

STATEMENT OF FACTS 5

OUTLINE AND SUMMARY OF STATE'S RESPONSE 7

STATE'S REPLY TO THE QUESTION ON REVIEW 7

DISCUSSION 7

CONCLUSION AND PRAYER 16

CERTIFICATE OF COMPLIANCE.....17

CERTIFICATE OF SERVICE 17

INDEX OF AUTHORITIES

Page(s)

Cases

Bigon v. State,
252 S.W.3d 360 (Tex. Crim. App. 2008) 13, 15

Childress v. State,
285 S.W.3d 544 (Tex. App. − Waco 2009, pet. ref'd).....7, 8, 12, 14, 15

Ex parte Castillo,
469 S.W.3d 165 (Tex. Crim. App. 2015) 8

Ervin v. State,
991 S.W.2d 804 (Tex. Crim. App. 1999) 13

Ex parte Hawkins,
6 S.W.3d 554 (Tex. Crim. App. 1999) 9

Johnson v. State,
208 S.W.3d 478 (Tex. App. - Austin 2006, pet. ref'd) 15

Ex parte McWilliams,
634 S.W.2d 815 (Tex. Crim. App.1980) 11

Missouri v. Hunter,
459 U.S. 359, 103 S.Ct. 673 (1983).....9, 15

Perry v. State,
No. 06-13-00051-CR, 2014 WL 3973929
(Tex. App. – Texarkana Aug. 15, 2014, pet. ref'd).....8, 12, 14, 15

Philmon v. State,
580 S.W.3d 377
(Tex. App. – Houston [1st Dist.] 2019, pet. granted).....7, 15

Schmidt v. State,
232 S.W.3d 66 (Tex. Crim. App. 2007) 12

Scott v. State,
No. 03-15-00632-CR, 2017 WL 2628243
(Tex. App. – Austin, June 15, 2017, no pet.).....8, 12, 14, 15

Shelby v. State,
448 S.W.3d 431 (Tex. Crim. App. 2014) 14

Steels v. State,
170 S.W.3d 765 (Tex. App.—Waco 2005, no pet.) 8

United States v. Dixon,
509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) 11

Urtado v. State,
333 S.W.3d 418 (Tex. App.—Austin 2011, pet. ref'd).....8

Williams v. State,
294 S.W.3d 674 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).....8

Statutes

TEX. FAM. CODE § 71.0021(b).....11

TEX. PENAL CODE § 3.02(a)(2).....11

TEX. PENAL CODE § 22.01(b)(2)(A)-(B) 7, 15

TEX. PENAL CODE § 22.02(a)(2).....7, 15

TEX. PENAL CODE § 22.02(b)(2).....11

STATEMENT OF FACTS

Because the sole question on discretionary review involves double jeopardy, Respondent [hereinafter "the State"] will limit its discussion of the testimony to facts pertinent to that issue.

Petitioner [hereinafter "Appellant"] was arrested following an argument with his girlfriend over his alleged infidelity. The quarrel quickly turned into a more serious incident with multiple threats of bodily injury, then actual bodily injury. The exact chronology follows.

Just before noon on November 20, 2016, Appellant and his girlfriend, Evonne White, began arguing over her suspicions that he was seeing other women. RR. Vol. 3 at 31, 129. The two had been in a dating relationship for several months and were living together in a Euless apartment leased by Ms. White. RR. Vol. 3 at 31-50. The argument quickly escalated from threats of physical violence to actual physical violence. RR. Vol. 3 at 33, 129.

During the initial verbal altercation Appellant struck matches and attempted to burn clothing he gathered and placed near the center of the apartment's living room. RR. Vol. 3 at 129-130. When Ms. White warned him of the possibility his actions might burn the whole apartment, Appellant pushed her onto an air mattress, took the battery out of her phone, and threw it across the room. RR. Vol. 3 at 130-131. He then threatened her with the metal bar portion of an exercise weight by

shaking it in the direction of her head and telling her in no uncertain terms what he intended to do: "Bitch, I don't give a fuck about you right now. I'm going to beat the shit out of you." RR. Vol. 3 at 131-135. He then retrieved a gun, shook it in her face, and told her he was going to "pistol-whip" her. RR. Vol. 3 at 138-139. Finally, he walked into the kitchen and grabbed some plastic storage bags and kitchen knives. RR. Vol. 3 at 141-142. He threatened her with a knife, then wrapped one of the bags around her head and attempted to suffocate her by raising the bag with his hands so as to constrict her throat to prevent her from breathing. RR. Vol. 3 at 142, 148. Ms. White fought and screamed, later recalling that Appellant repeatedly told her she was going to die, and seemed to enjoy torturing her. RR. Vol. 3 at 142-144. She was saved when a neighbor heard her screams, came to the apartment, and summoned the police. RR. Vol. 3 at 151-153.

OUTLINE AND SUMMARY OF THE STATE'S RESPONSE: STATE'S REPLY TO THE QUESTION ON REVIEW

THE QUESTION: "Did the court of appeals err in holding that the conviction in Count Two for assault on a family member did not violate the double jeopardy clause of the Fifth Amendment?" Appellant's brief, pp. 6-18.

STATE'S REPLY: Appellant's two convictions and sentences involved separate acts of misconduct, and the court of appeals (and three other Texas intermediate courts of appeals) correctly determined they do not violate the prohibition against double jeopardy.

DISCUSSION

The issue is whether the court of appeals was correct in ruling that Appellant was properly convicted and sentenced for both aggravated assault by threats with a deadly weapon[1] (Count One, including its various paragraphs), and assault by impeding breathing and dating violence[2] (Count Two), where no double jeopardy violation appears on the face of the record. *See Philmon v. State*, 580 S.W.3d 377 (Tex. App. – Houston [1st Dist.] 2019, pet. granted).

This exact question has been addressed by multiple Texas reviewing courts (but never by this Court), whose rulings have uniformly been against defendants alleging double jeopardy violations. For example, in *Childress v. State*, 285 S.W.3d 544 (Tex. App. − Waco 2009, pet. ref'd), an identical situation and contention was

[1] *See* TEX. PENAL CODE §22.02(a)(2).

[2] *See* TEX. PENAL CODE §22.01(b)(2)(A)-(B).

presented to the Tenth Court of Appeals. Childress was charged in one count of his indictment with aggravated assault by threatened use of a deadly weapon, and in a second count with dating violence assault. *Id*. at 548-49. No double jeopardy objection was made in the trial court, so the issue became whether double jeopardy was "apparent on the face" of the record. *Id.* After extensive analysis, the Waco Court rejected the defendant's double jeopardy complaint and affirmed the two convictions and sentences. *Id*. *See* also *Scott v. State*, No. 03-15-00632-CR, 2017 WL 2628243 (Tex. App. − Austin, June 15, 2017, no pet.) (mem. op. not designated for publication) (following *Childress* in upholding separate convictions for aggravated assault family violence causing serious bodily injury with a deadly weapon, and aggravated assault by threat with a deadly weapon); and *Perry v. State*, No. 06-13-00051-CR, 2014 WL 3973929 (Tex. App. − Texarkana Aug. 15, 2014, pet. ref'd) (mem. op. not designated for publication) (following *Childress* in upholding convictions for assault family violence with prior family violence and aggravated assault with a deadly weapon); 1Tex. Prac. Guide, Crim. Prac. & Proc. § 12:19, April 2018 Update[3]. In the following discussion, the State borrows liberally

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3 Stating: "Cumulative punishment, consistent with the Double Jeopardy Clause, may be imposed where separate offenses occur in the same transaction, as long as each conviction requires proof of an additional element which the other does not. *Ex parte Castillo*, 469 S.W.3d 165 (Tex. Crim. App. 2015); *Urtado v. State*, 333 S.W.3d 418, 424 (Tex. App.—Austin 2011, pet. ref'd); *Childress v. State*, 285 S.W.3d 544, 549 to 550 (Tex. App.—Waco 2009, pet. ref'd); *Steels v. State*, 170 S.W.3d 765, 768 (Tex. App.—Waco 2005, no pet.); *Williams v. State*, 294 S.W.3d 674, 679 n.2 (Tex. App.—Houston [1st Dist.] 2009, pet.

from the Waco Court's opinion in *Childress*.

The question of multiple punishments in one trial is entirely an issue of legislative intent. *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679 (1983); *Ex parte Hawkins*, 6 S.W.3d 554, 558 (Tex. Crim. App. 1999). When the legislature specifically authorizes cumulative punishments under two statutes, regardless of whether the two statutes proscribe the same conduct, the reviewing court's task is at an end, and the prosecutor may seek and the trial court and jury may impose cumulative punishments under such statutes in a single trial. *Hunter*, 459 U.S. at 368-69

In pertinent part, the indictment against Appellant alleged:

> [**COUNT ONE**]…MANYIEL PHILMON, HEREINAFTER CALLED DEFENDANT, ON OR ABOUT THE 20TH DAY OF NOVEMBER 2016, IN THE COUNTY OF TARRANT, STATE OF TEXAS, DID INTENTIONALLY OR KNOWINGLY THREATEN IMMINENT BODILY INJURY TO EVONNE WHITE AND THE DEFENDANT DID USE OR EXHIBIT A DEADLY WEAPON DURING THE COMMISSION OF THE ASSAULT, NAMELY A KNIFE, THAT IN THE MANNER OF ITS USE OR INTENDED USE WAS CAPABLE OF CAUSING DEATH OR SERIOUS BODILY INJURY,
>
> PARAGRAPH TWO: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT 20TH DAY OF NOVEMBER 2016, DID INTENTIONALLY OR KNOWINGLY THREATEN IMMINENT BODILY INJURY TO EVONNE WHITE AND THE DEFENDANT DID USE OR EXHIBIT A DEADLY WEAPON DURING THE COMMISSION OF THE ASSAULT, NAMELY A METAL

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ref'd)".

BAR, THAT IN THE MANNER OF ITS USE OR INTENDED USE WAS CAPABLE OF CAUSING DEATH OR SERIOUS BODILY INJURY,

PARAGRAPH THREE: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT 20TH DAY OF NOVEMBER 2016, DID INTENTIONALLY OR KNOWINGLY THREATEN IMMINENT BODILY INJURY TO EVONNE WHITE AND THE DEFENDANT DID USE OR EXHIBIT A DEADLY WEAPON DURING THE COMMISSION OF THE ASSAULT, NAMELY A BAG, THAT IN THE MANNER OF ITS USE OR INTENDED USE WAS CAPABLE OF CAUSING DEATH OR SERIOUS BODILY INJURY,

PARAGRAPH FOUR: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT INTHE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT 20TH DAY OF NOVEMBER 2016, DID INTENTIONALLY OR KNOWINGLY THREATEN IMMINENT BODILY INJURY TO EVONNE WHITE AND THE DEFENDANT DID USE OR EXHIBIT A DEADLY WEAPON DURING THE COMMISSION OF THE ASSAULT, NAMELY A METAL OBJECT, THAT IN THE MANNER OF ITS USE OR INTENDED USE WAS CAPABLE OF CAUSING DEATH OR SERIOUS BODILY INJURY,

COUNT TWO: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 20TH DAY OF NOVEMBER 2016, DID INTENTIONALLY, KNOWINGLY, OR RECKLESSLY CAUSE BODILY INJURY TO EVONNE WHITE BY IMPEDINGTHE NORMAL BREATHING OR CIRCULATION OF THE BLOOD OF EVONNE WHITE BY APPLYING PRESSURE TO THE THROAT OR NECK OF EVONNE WHITE WITH HIS HAND OR ARM, AND EVONNE WHITE WAS AMEMBER OF THE DEFENDANT'S FAMILY OR HOUSEHOLD OR A PERSON WITH WHOM THE DEFENDANT HAD A DATING RELATIONSHIP.

CR. at 6.

The jury returned separate verdicts of guilt, and separate sentences on each

count, which the trial court ordered to run concurrent. CR. 63-65; RR. Vol. 4 at 31-32, 42: As in *Childress*, no objection was raised by Appellant in the trial court to either the verdicts or sentences.

The United States Supreme Court long has eliminated the "same conduct" rule — the idea that just because a defendant engaged in only one "culpable act," he cannot be convicted of more than one offense. *See United States v. Dixon,* 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556 (1993). Under Texas law, an accused may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode. See TEX. PENAL CODE §3.02(a)(2).

There may be a substantial overlap in the proof of each offense, but reviewing courts must examine the separately charged elements of each offense. *Ex parte McWilliams,* 634 S.W.2d 815, 824 (Tex. Crim. App.1980). When comparing the two counts of the present indictment, and taking into account all of the elements that the State must prove in connection with those charges, the offenses here, on their face, are *not* the same.

The basis for the underlying aggravated assault — the *threat* of imminent bodily injury from the various alleged deadly weapons — is distinct from the basis for the dating violence[4] assault and breathing restriction, which is *actual* bodily

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4 See TEX. FAM. CODE §71.0021(b)(defining "dating violence" referenced under TEX. PENAL CODE §22.02(b)(2)).

injury. *See* CR. at 6.

The dating violence and breathing restriction assault is not a lesser-included offense of the aggravated assault, as alleged here, and it is not established by proof of the same or less than all the facts required to establish the commission of the aggravated assault. As noted in the concurring opinion in the court of appeals, the State does not contend multiple convictions and sentences for aggravated assault and assault can *never* present valid double jeopardy concerns; it only contends that here, as in *Childress* and its progeny, no double jeopardy violation is apparent on the face of the record, which is the test on appeal for unobjected-to claims involving that category of error. *Childress*, 285 S.W.3d at 544; *Scott*, 2017 WL 2628243; *Perry* 2014 WL 3973929. The statement on page 14 of Appellant's brief that ". . .there is a *risk* that Appellant was convicted for the same conduct," is an implicit concession by Appellant that no double jeopardy violation is apparent on the face of the record. Appellant's brief at 14 (emphasis added). It is not enough that there exists a "risk" of a double jeopardy violation. In order for a defendant to prevail on appeal, the violation must be "apparent," where there was no trial objection. *Childress*, 285 S.W.3d at 544; *Scott*, 2017 WL 2628243; *Perry* 2014 WL 3973929.

Further, Texas law has no bright-line rule that a threat of harm and actual harm cannot arise from the same act and occur simultaneously, or that the threat must precede the initial harm. *See Schmidt v. State*, 232 S.W.3d 66, 67–69 (Tex. Crim.

App. 2007).

The offenses alleged in the indictment charging Appellant are not the same; therefore, as this Court has directed, reviewing courts must consider a non-exclusive list of factors when examining whether two offenses are the same in the context of multiple punishments. *See Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). These factors include: (1) whether the offenses are in the same statutory section; (2) whether the offenses are phrased in the alternative; (3) whether the offenses are named similarly; (4) whether the offenses have common punishment ranges; (5) whether the offenses have a common focus; (6) whether the common focus tends to indicate a single instance of conduct; (7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same; and (8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double-jeopardy purposes. *Id.* These factors are not exclusive, and the question ultimately is whether the legislature intended to allow the same conduct to be punished under both of the offenses. *Bigon v. State*, 252 S.W.3d 360, 371 (Tex. Crim. App. 2008).

It is apparent that the legislature intended these two offenses to be treated separately, at least as alleged in the instant indictment. While they are in the same chapter of the Penal Code, they are separate and distinct statutes, and they are not

phrased in the indictment in the alternative. CR. at 6. They do not have common punishment ranges, and while they have a related focus — assaults — in this case there is no common focus between the two offenses. The dating violence and breathing restriction assault focus is on the bodily injury to the victim, while the focus of the aggravated assault, in this case, is the assaultive conduct in the form of threatening imminent bodily injury with various deadly weapons.

The differing elements between dating violence and breathing restriction assault, and aggravated assault, as charged in the instant indictment, cannot be considered the same under an imputed theory of liability. Dating violence assault and breathing restriction assault, with their bodily injury element, are not similar to an imminent threat of bodily injury with a deadly weapon. After reviewing the *Ervin* factors, this Court should determine that the offenses as charged are not the same in the context of multiple punishments. *See Childress*, 285 S.W.3d at 544; *Scott*, 2017 WL 2628243; *Perry* 2014 WL 3973929; 1Tex. Prac. Guide Crim. Prac. & Procedure at §12:19. Accordingly, the court of appeals was correct when it held no double-jeopardy violation occurred.

The State believes Appellant's reliance on this Court's opinion in *Shelby v. State*, 448 S.W.3d 431 (Tex. Crim. App. 2014) is misplaced. There the Court determined Mr. Shelby's separate convictions for intoxication assault and aggravated assault on a public servant were precluded on double jeopardy grounds

"under the circumstances in this case." *Id*. at 440. As noted in the concurring opinion in the instant case, while there is no "hard-and-fast" rule, the particular circumstances of the instant case support the opposite conclusion. *Philmon*, 580 S.W.3d 377 at 385-86.

The legislature implicitly authorized convictions under both TEX. PENAL CODE §22.02(a)(2), and §22.01(b)(2)(A)-(B); therefore, Appellant's prosecution under §22.02 and §22.01 did not constitute a Double Jeopardy violation. *See Hunter*, 459 U.S. at 368-69, 103 S. Ct. 673 at 679; *Johnson v. State*, 208 S.W.3d 478, 511 (Tex. App. - Austin 2006, pet. ref'd). The Court of Appeals correctly ruled the convictions did not violate double jeopardy principles, and correctly determined no double jeopardy violation appears on the face of the record. *Philmon*, 580 S.W.3d 377 at 380-86; *Childress*, 285 S.W.3d at 544; *Scott*, 2017 WL 2628243; *Perry* 2014 WL 3973929; *See* 1Tex. Prac. Guide Crim. Prac. & Procedure at §12:19.

The lower court's decision affirming the convictions should be upheld[5].

[5] In the event this Court determines there *was* a double jeopardy violation, it should reform the judgment to vacate the conviction for assault-family violence, the less serious offense. *See Bigon v. State*, 252 S.W.3d 360, 372 (Tex. Crim. App. 2008).

CONCLUSION AND PRAYER

The State prays that the Houston Court of Appeals for the First District's majority and concurring opinions be affirmed, or for such further relief the Court believes is appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 2,694 words per the Texas Rules of Appellate Procedure 9.4(e) and (i).

/s/ DAVID RICHARDS
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CERTIFICATE OF SERVICE

A copy of this State's Brief on the Merits has been mailed this day to opposing counsel, Mr. Daniel Collins, 3000 E. Loop 820, Fort Worth, Texas, 76112, via email to: Daniel@DanielCollinslaw.com on this, the 2nd day of December, 2019.

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